



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE  
WASHINGTON, DC 20231  
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DEC 31 2003

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OFFICE OF THE DIRECTOR  
TC 3800

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Oradell, NJ 07649

In re application of  
Hank Kleban  
Application No. 09/800,871  
Filed: March 7, 2001  
For: EQUAL RESPONSE AXLE

DECISION ON PETITION  
TO WITHDRAW THE  
HOLDING OF ABANDONMENT

This is in response to applicant's renewed petition to withdraw the holding of abandonment filed in the United States Patent and Trademark Office (USPTO) on July 16, 2003.

The petition is **DENIED**.

A review of the application file reveals that an Office action, setting a two-month shortened statutory period for reply, was mailed to the applicant on July 16, 2002. A reply was received on January 27, 2003. However, that reply was received after the six-month statutory time period, which expired on January 16, 2003. Thus the application was held to be abandoned in a Notice of Abandonment mailed February 21, 2003.

Applicant's renewed petition alleges that a reply was filed by facsimile on August 13, 2002. A copy of the reply is again included with the petition.

There is no evidence in the file record of the Office having received any such facsimile communication.

Applicant has submitted a copy of a facsimile transmission activity report showing dates of facsimile transmissions on and around the date the facsimile response was allegedly sent; August 13, 2002. Also provided is a copy of the facsimile cover sheet of the alleged response. This is not a Certificate of Transmission, as shown in MPEP section 512. The only acceptable proof to accord an earlier filing date to a copy of a communication that was originally submitted by facsimile would be a copy of a Certificate of Transmission that was *attached to and identified the original* transmission it accompanied. Since apparently the applicant failed to use such a certificate with the original transmission, the copy of the response included with the petition cannot be accorded the timely filing date requested. Therefore, the application is properly held as being abandoned.

Since applicant's petition to withdraw the Holding of Abandonment will not be granted applicant may wish to consider filing a petition to revive under 37 CFR 1.137(a) (unavoidable delay) or 37 CFR 1.137(b) (unintentional delay) as discussed below.

#### I. Unavoidable Delay.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by: **(1)** the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute; **(2)** the petition fee required by 37 CFR 1.17(l); and **(3)** an adequate showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The showing requirement can be met by submission of statements of fact establishing that the delay in filing the reply was unavoidable. This includes a satisfactory showing that the cause of the delay resulting in failure to reply in a timely fashion to the Office action was unavoidable. Diligence during the time period between abandonment and filing of the petition to revive must also be shown.

As an alternative to filing a petition for unavoidable abandonment, a petition for revival of an application abandoned unintentionally under 37 CFR 1.137(b) might be appropriate.

#### II Unintentional Delay.

A grantable petition to revive an abandoned application under 37 CFR 1.137(b) must be accompanied by: **(1)** the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute; **(2)** the petition fee required by 37 CFR 1.17(m); and **(3)** a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.

The petition fee required by law for filing a petition under unavoidable standard is \$110. The fee for a petition under the unintentional standard is \$1,300. If applicant has, or can qualify as a "small entity" and does so prior to or together with the payment of the fee, the fee will be one-half of the amount indicated.

If not previously filed, the reply to the outstanding Office action must accompany the petition to revive.

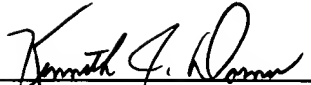
The required items should be promptly submitted under a cover letter entitled "Petition to Revive".

Further correspondence with respect to a petition to revive should be addressed as follows:

By mail: Deputy Commissioner of Patent Examination Policy  
Box 1450  
Alexandria, VA 22313-1450

By FAX: (703) 308-6916  
Attn: Office of Petitions

By Hand: Crystal Plaza 4, Suite 3C23  
2201 South Clark Place  
Arlington, VA 22202

  
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KJD/cps: 12/22/03